



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 3, 1993

Mr. J. Robert Giddings
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR93-053

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 17435.

You have received a request for information relating to a sexual assault that occurred at a fraternity house. Specifically, the requestor seeks a copy of the University of Texas at Arlington Police Department (the "police department") Report No. 09116434. The report which has been submitted to us for review includes incident reports, offense report narratives, numerous witness statements, a police blotter sheet, mug shots, forensic reports, various medical records, physical evidence records, polygraph examination results, NCIC Interstate Identification Index (III) records, student schedule information, a university alcohol event roster, correspondence from the university to students regarding disciplinary matters, student directory information, documents detailing fraternity and sorority membership, documents generated by the Delta Tau Delta fraternity, attorney correspondence, court records, and various newspaper articles. You claim that all or part of the report is excepted from required public disclosure by sections 3(a)(1), 3(a)(8), 3(a)(14), and 14(e) of the Open Records Act.

Because it is most inclusive, we address first your claim that the report is excepted from required public disclosure by section 3(a)(8) of the Open Records Act, which provides an exception for

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

When the "law enforcement" exception is claimed as a basis for excluding information under section 3(a)(8), the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release of the requested information would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 2-3. In particular, where an incident is no longer under active investigation or prosecution, the agency must show that the release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decisions Nos. 553 (1990) at 4; 474 (1987) at 5.¹

In Open Records Decision No. 408 (1984) (copy enclosed), this office determined that records of a law enforcement agency relating to an aggravated robbery investigation were excepted from required public disclosure under section 3(a)(8). In that case, an individual was initially indicted for robbery on the basis of two eyewitness identifications. The eyewitnesses later became uncertain about their identification of him as the robber, and the indictment was eventually dismissed for insufficient evidence. While the police were not actively pursuing the investigation on a daily basis, the investigatory file remained open pending acquisition of evidence leading to the apprehension of another suspect.

In this case, you advise that the police report relates to a suspended criminal investigation by the department into allegations of aggravated sexual assault. You also advise that two grand juries, one in Dallas and one in Fort Worth, have investigated these allegations and that neither grand jury issued indictments on completion of their investigations. Furthermore, you do not explain, however, under what circumstances the investigation might be reactivated; nor do you indicate what additional information remains to be discovered about the incident. Finally, the requested documents read as a whole indicate that no additional evidence remains to be discovered. We conclude therefore that you have not established that the release of those documents would unduly interfere with law enforcement.

We turn next to section 3(a)(1) of the Open Records Act, which excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that the requested information is excepted from required public disclosure by section 3(a)(1) in conjunction with the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, which as a general rule prohibits the release of "education records" to persons other than a student's parents. 20 U.S.C. § 1232g(b)(1); *see also* V.T.C.S. art. 6252-17a, §§ 3(a)(14), 14(e) (incorporating

¹*See also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977) (citing *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976)).

the requirements of FERPA into the Open Records Act).² Effective July 23, 1992, FERPA was amended to provide:

The term "education record" does not include --

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- (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.

Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555, 106 Stat. 448 (July 23, 1992) (to be codified at 20 U.S.C. § 1232g(a)(4)(B)). The incident reports, offense report narratives, witness statements, police blotter sheet, and mug shots, *inter alia*, are "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." Thus, these documents may not be withheld as "education records" under FERPA. See Open Records Decision No. 612 (1992) (copy enclosed).

Nevertheless, some of the information included among the records maintained by the department for purposes of law enforcement clearly constitutes "education records" within the meaning of FERPA. Specifically, the student schedule information, university alcohol event roster, and correspondence from the university to students regarding disciplinary matters are "education records" subject to FERPA.³ The Family Policy and Regulations Office of the United States Department of Education has advised us that rules have not yet been adopted under the recent amendment regarding the availability of "education records" maintained but not created by a law enforcement unit of an educational agency or institution for the purpose of law enforcement. Until those rules are issued, this office cannot resolve the question of the availability of the "education records"

²We note that "directory information" must be released provided that the educational agency gives public notice of the categories of information which it has designated as such information and allows a reasonable period of time after notice has been given for a parent to inform the agency that information shall not be released without the parent's prior consent. 20 U.S.C. § 1232g(a)(4)(B) - (a)(5); see also Open Records Decision No. 431 (1985). Please address any queries regarding FERPA to:

Family Policy and Regulations Office
Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202.

³We are advised by the Family Policy and Regulations Office of the United States Department of Education that information generated by a fraternity organization does not constitute "education records" and is thus not subject to FERPA.

at issue here under the act. Thus, we have assigned identification #18455 to that part of your request, and we will decide that issue after adoption of the relevant rules.

Finally, we address whether the requested information is otherwise made confidential by law and thus excepted from required public disclosure by section 3(a)(1) of the Open Records Act. Having examined the documents submitted to us for review, we conclude that some of the requested information is excepted from required public disclosure by section 3(a)(1) in conjunction with the doctrine of common-law privacy; section 5.08 of the Medical Practice Act, article 4495b, V.T.C.S.; section 19A of the Polygraph Examiner's Act, article 4413(29cc), V.T.C.S.; and federal regulations governing the release of information obtained from the National Crime Information Center ("NCIC") Interstate Identification Index ("III"). For your convenience, we have marked the information that must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act. All remaining information is not protected under section 3(a)(1) and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-053.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/GCK/mc

Enclosures: Documents

Open Records Decision Nos. 612; 408

Ref.: ID# 17435

ID# 17519

ID# 17783

cc: Mr. Jason Sickles
Department of Student Publications
UT Arlington Box 19038
Arlington, Texas 76019
(w/o enclosures)